



EYES ON THE ICC

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The Council for American Students in International Negotiations (CASIN), founded as the Independent Student Coalition for the International Criminal Court (ISC-ICC), began as the only student-based organization in the United States dedicated to educating the American public about the Rome Statute and the International Criminal Court. The ISC-ICC started as a simple petition, signed by U.S. college and university students across the country, asking then-President Clinton to allow the United States to become a signatory to the Rome Statute. The belief of this initial group of students in the value of a relationship between the U.S. and the ICC has since grown into an effective organization that depends the understanding and commitment of American students to multilateral institutions.

American students from across the country, referred to at the UN as “voices of the future,” participated in the preparatory negotiations for the Court under the auspices of the ISC-ICC. Representing the next generation of American leaders, CASIN has continued to participate in negotiations for the Court at meetings of the Assembly of States Parties, the governing body for the Court. Several times a year CASIN sends delegations of students to high-profile international conventions to participate first-hand in the international policy-making process.

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THE INTERNATIONAL COURT AT WORK: THE FIRST CASES AND SITUATIONS

*Alina Ioana Apreotesei**

After decades of *travaux préparatoires*, the International Criminal Court (ICC) is a reality. It is not just a Court, but a potential system of justice created by the international community that is dependent on interaction between states, civil society, and international organizations.¹ The International Military Tribunal at Nuremberg was the first multi-national criminal tribunal² and the United Nation's International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were the first *ad hoc* international criminal courts.³ Such developments in international criminal law, which "result[ed] from a myriad of small or great tragedies,"⁴ increasingly demonstrated the need for a permanent international criminal court.

In the ten years since the signing of the Rome Statute, more than 100 states have accepted the ICC's jurisdiction.⁵ The number of referrals the ICC receives from diverse sources concerning situations where it might have jurisdiction is continuously increasing. In its first year of activity, the ICC received 473 referrals.⁶ By 1 February 2006, this number had increased to 1,732 referrals from 103 countries and by October 2007, the number of complaints had reached 2,889.⁷ An initial review process found 80 percent of these referrals to be outside of the court's jurisdiction. Out of ten situations subjected to intensive analysis, three had proceeded to the investigation stage, two were dismissed, and five remained ongoing.⁸

As of November 2008, the ICC had opened investigations into four situations, all located in Africa: Democratic Republic of Congo (DRC), Darfur (western Sudan), Central African Republic (CAR), and Uganda. These particular cases drew the Prosecutor's attention because of the gravity of the crimes and the large number of victims involved. Each situation has been devastating and involves intentional, systematic, and widespread killing, sexual

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¹ As stressed by Mrs. Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, with the occasion of the conference: *Fighting Impunity in a Fragmented World: New Challenges for the International Criminal Court*, European University Institute, 23-24 May 2008.

² William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1998)* or M. Cherif Bassiouni, *The Nuremberg Legacy*, in M. Cherif Bassiouni (ed.), *INTERNATIONAL CRIMINAL LAW*, 2ND ED., VOL. III (1999).

³ T. Meron, *WAR CRIMES LAW COMES OF AGE: ESSAYS 198-199* (1998).

⁴ Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* (2003), preface.

⁵ 108 states as of November 2008.

⁶ See *Communications received by the Prosecutor since July 2002*, posted on 24 July 2003, available at <http://www.icc-cpi.int/library/press/mediaalert/>.

⁷ ICC, Assembly of States Parties, 6th Session, New York, 30 Nov to 14 December 2007, ICC-ASP/6/18, *Report on the activities of the Court*, I, ¶35, 18 October 2007.

⁸ *Update on communications received by the office of the Prosecutor of the ICC*, 10 February 2006, available at <http://www.icc-cpi.int/library/organs/otp/>.

violence, and abductions.⁹ By 2006, the ongoing conflict in the Democratic Republic of Congo had led to almost 4 million deaths and more than one and a half million internally displaced persons; today, approximately 1,200 people continue to die each day from violence, disease or starvation.¹⁰ An estimated 30,000 children serve in armed groups, constituting more than forty percent of the rebel forces and militias.¹¹ In the Central African Republic, more than 70,000 citizens have fled to neighboring countries and another 200,000 people remain internally displaced.¹² The number of deaths remains difficult to establish.¹³ In Darfur, more than 90,000 people are believed to have died since 2003 as a direct consequence of the conflict, and another 200,000 due to disease and malnutrition. Over 2.3 million people remain internally displaced.¹⁴ In Uganda, tens of thousands of children have been abducted by the Lord's Resistance Army. As of May 2007, at least 1.6 million people were internally displaced¹⁵ and tens of thousands killed, abducted, enslaved, or raped.¹⁶

And yet, even in the midst of these horrifying statistics indicating an appalling degree of death and destruction, accountability remains almost nonexistent in all four situations. The ICC Prosecutor has issued thirteen arrest warrants—five for the situation in Uganda, three in Darfur, one in CAR, and four in DRC—but only four have been enforced. Of the remaining eight arrest warrants, one was withdrawn because of the suspect's death, one still needs to be addressed by the judges, and the final seven remain pending. Charges have been confirmed against three of the four persons in custody. Finally, ten years after the signing of the Rome Statute, the Court is ready to start its first trial.¹⁷

⁹ Office of the Prosecutor, *Letter to senders concerning the situation in Iraq*, 9 February 2006, available at <http://www.icc-cpi.int/library/organs/otp/>.

¹⁰ Amnesty International, *Children at War: Creating Hope for their Future* (2006).

¹¹ *Ibid.*

¹² Amnesty International, *Central African Republic: Civilians in Peril in the Wild North* (2007).

¹³ *Ibid.*

¹⁴ Amnesty International, *Sudan: Displaced in Darfur: A Generation of Anger* (2008).

¹⁵ Amnesty International, *Uganda Doubly Traumatized: Lack of Access to Justice for Female Victims of Sexual and Gender-Based Violence in Northern Uganda* (2007).

¹⁶ Amnesty International, *Arrest Now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (2007).

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*. The ICC's first trial was to begin on 23 June 2008. On 11 June 2008, Trial Chamber I announced that the trial was to be postponed until a date which would be further announced. On 18 November 2008, the judges announced that Lubanga's trial will start on 26 January 2009. See ICC Press release, ICC-CPI-20080611-PR322-ENG, *The trial in the case of Thomas Lubanga Dyilo will not start on 23 June 2008*, 11 June 2008. See also ICC press releases, ICC-CPI-20080616-PR-324-ENG, *Trial Chamber imposes a stay on the proceedings of the case against Thomas Lubanga Dyilo*, 16 June 2008, and ICC-CPI-20081118-PR371-ENG, *Stay of proceedings in Lubanga's case is lifted – trial provisionally scheduled for 26 January 2009*, available at <http://www.icc-cpi.int/press/pressreleases/>.

I. THE DEMOCRATIC REPUBLIC OF CONGO

Congo officially became a Belgian colony in 1908 and gained political independence in 1960.¹⁸ Former Army Chief of Staff, Mobutu Sese Seko soon became President and began to rule with a violent iron fist.¹⁹ During the Cold War, Zaire—as the country was renamed by Mobutu—enjoyed strong support from the West and became a “staging post for US anti-communist wars in Africa.”²⁰

Conflict began in the southern Ituri region in 1992 and in the northern Kivu region in 1993, increasing in 1996 along the Ugandan and Rwandan borders.²¹ Using this climate as an opportunity, Laurent Kabila²² launched a military campaign against Mobutu, with assistance from Rwanda and Uganda, ultimately removing Mobutu from power and proclaiming himself President of the country. A second war²³ began in 1998, eventually leaving behind more than three million victims and two and a half million refugees.²⁴ The Lusaka cease-fire agreement, signed in July 1999, was soon followed by the establishment of a UN peacekeeping mission, United Nations Mission in the Democratic Republic of Congo (MONUC), in 2000. President Kabila was assassinated in January 2001 and replaced by his son Joseph. Subsequent peace negotiations resulted in Rwandan and Ugandan withdrawal in late 2002. By October 2002, 90 percent of Ugandan troops had left DRC and both Burundi and Rwanda had announced to the UN that they had completely withdrawn their military forces.²⁵

Foreign troop withdrawal followed a number of agitated events, such as when the DRC initiated proceedings before the International Court of Justice (ICJ) against Burundi, Uganda, and Rwanda for “acts of armed aggression committed . . . in flagrant breach of the United Nations Charter and of the

¹⁸ Adam Hochschild, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1999). For a comparison of the political parties in several African countries, see Sabine C. Carey, *A Comparative Analysis of Political Parties in Kenya, Zambia and the Democratic Republic of Congo*, 9(3) *DEMOCRATIZATION* 53 (2002).

¹⁹ Larry Devlin, *CHIEF OF STATION, CONGO: A MEMOIR OF 1960-67* 263 (2007).

²⁰ Patricia Daley, *Challenges to Peace: Conflict Resolution in the Great Lakes Region of Africa*, 27(2) *THIRD WORLD QUARTERLY* 306 (2006).

²¹ Stanislas Bucyalimwe Mararo, *Kivu and Ituri in the Congo War: The Roots and Nature of a Linkage*, in Stefaan Marysse and Filip Reyntjens (eds.), *THE POLITICAL ECONOMY OF THE GREAT LAKES REGION IN AFRICA 190* (2005).

²² In 1996, Laurent Kabila was recruited to lead a revolt in South Kivu, and he launched sporadic attacks against Mobutu and his regime. See Henry C. Hoeben, *HUMAN RIGHTS IN THE DR CONGO: 1997 UNTIL THE PRESENT DAY: THE PREDICAMENT OF THE CHURCHES* 8 (2001).

²³ See Mararo, *supra* note 21, at 205.

²⁴ See Amnesty International Report, “*Our Brothers Who Help Kill Us*”: *Economic Exploitation and Human Rights Abuses in the East* 1 (2003).

²⁵ Emeric Rogier, *Democratic Republic of Congo: Problems of the Peacekeeping Process*, in Oliver Furley and Roy May (eds.), *ENDING AFRICA’S WARS: PROGRESSING TO PEACE* 107 (2006).

SOME ARE MORE EQUAL THAN OTHERS: VICTIM PARTICIPATION IN THE ICC

*Yvonne McDermott**

At the International Criminal Court (hereinafter, “the ICC” or “the Court”), for the first time in the history of international criminal justice, victims are given an opportunity to present their views and concerns, not only as witnesses, but in all stages of proceedings before the Court. When the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) were established, participation of victims at an international level was considered unfeasible, given the “tens of thousands”¹ of victims affected by crimes falling within the jurisdiction of the Tribunals. The same issues of efficiency and fairness which are pertinent in relation to the *ad hoc* tribunals are just as relevant, if not more so, in relation to the ICC. If the millions of ICC victims are to be given a voice, this must be done without overburdening the Court in terms of time and financial resources. Ultimately, only a limited number of victims will be able to participate; the selection of those few must be achieved in a manner that is fair to victims and that safeguards against disingenuous applications to participate. Finally, and most importantly, victim participation must not compromise the rights of the accused; it must not interfere with the presumption of innocence or the right to a fair and impartial trial without undue delay,² and it must not endanger the independence and objectivity of the Office of the Prosecutor.³

In the Court’s first actions, it appears that victims are treated “more equally” than other participants in the trial procedure: victims’ participatory rights have essentially trumped those of the Prosecutor and the Defense, and hampered the expediency of trials. This paper will also illustrate that, in spite of the best intentions of the ICC, the elevated treatment of victims in fact ends up disadvantaging victims overall.

Three different elements give rise to this thesis. First, as will be discussed in Part II, the definition of *who* can be considered a victim for the purpose of participation—a definition that remains far from clear but nonetheless has taken up much of the Court’s time—has broadened in scope to such an extent that future participation by victims looks to be even more time- and resource-intensive and ultimately unsustainable. Furthermore, the “two-pronged” approach developed by the ICC, whereby various criteria are assessed at an early stage while others are considered at subsequent later stages, goes against the intentions of the drafters of the Rome Statute, who determined that victim participation should only be permitted when it was certain that it would not be prejudicial to the rights of the accused or to the guarantee of a fair and impartial trial. It will be seen that this two-pronged assessment process has

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¹ Judge Claude Jorda, speaking in Sarajevo on 12 May 2001. ICTY Press Release, *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, JL/P.I.S./591-e, The Hague, 17 May 2001.

² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998 [hereinafter, “Rome Statute” or “RS”], at articles 66 and 67.

³ RS, at Article 42.

proven inefficient and is ultimately liable to disappoint those whose interests were of primary importance to the judges who devised the approach.

Second, the fact that victims have been allowed to participate in the investigation stage, before an accused has even been identified, is problematic. Part III of this paper demonstrates how allowing victims to participate at this stage jeopardizes the independence of the Prosecutor and infringes on the rights of the accused by causing undue delay, in addition to denying the right of the accused to reply immediately to allegations made against him.

Finally, the modalities of participation, which have been developed to include access to the Prosecutor's documents; the introduction of evidence pertaining to the guilt or innocence of the accused and the raising of points of law stretch far beyond the object and purpose of victim participation rights in the Rome Statute. Part IV of this paper argues that such participation does not fit the statutory limitations of "views and concerns"⁴ and breaches the fundamental criminal law principle of equality of arms.

Article 68(3) of the Rome Statute is the main provision that sets out the framework for participation of victims. This provision is unequivocal as to where the balance should fall between the rights of victims and those of the accused. It states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

In other words, according to the Rome Statute, participation of victims should not in any way dilute or reduce the rights of the accused to a fair and impartial trial.

One specific right guaranteed to the accused under Article 67(1)(c) of the Rome Statute is the right to be tried without undue delay. Nonetheless, speaking at the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998, former UN Secretary General, Kofi Annan, stated that, "the overriding interest must be that of the victims, and of the international community as a whole. ... It must be an instrument of justice, not expediency."⁵ However, "expediency" and "justice" are not mutually exclusive concepts—there can be no justice without expediency, efficiency, and respect for the rights of all stakeholders in ICC proceedings, in particular the right of the accused to a fair trial. In placing an overriding emphasis on the interests of the victims, the ICC could threaten not only the rights of defendants⁶ but also the

⁴ RS, at Article 68(3).

⁵ United Nations Press Release, *UN Secretary General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole*, 15 June 1998, available at <http://www.un.org/icc/pressrel/1rom6r1.htm>.

⁶ Alison M. Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 146 (2005). Danner and Martinez warn that a growing international concern for victims' human rights "has proven a more potent influence than worries

role of the Prosecutor—and indeed the entire functioning capacity of the Court.

I. WHO MAY PARTICIPATE AS A VICTIM?

After formulating the Rome Statute to include the participation of victims, a definition of the term “victim” in the Rules of Procedure and Evidence had to be negotiated. The present section examines the elements of this definition, as laid out in Rule 85, and argues that the definition of who may participate as a “victim” has been judicially broadened in scope to such an extent that future participation by victims looks to be even more time- and resource-consuming and ultimately unsustainable. Furthermore, the “two-pronged” approach developed by the ICC goes against the intentions of the drafters of the Rome Statute; it has proven inefficient and is ultimately liable to disappoint those whose interests were of primary importance to the judges who devised the approach.

Negotiating the Definition

The drafting of the definition for the term “victim” saw delegates eager to emphasize the restorative justice⁷ aspect of participatory rights. Many delegates were therefore keen to move away the narrow definition of the term “victim” in the ICTY and ICTR Statutes: “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”⁸ The Colombian delegation, in particular, was vociferous about the position of the victims in the *ad hoc* Tribunals, saying, “The victim...was an uninvited guest, a spectator, which exacerbated the conflict.”⁹ During the drafting of the Rome Statute, delegates’ attention was drawn to the definition contained in the United Nations Declaration of Principles of Justice for Victims of Crime and Abuse of Power:

“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury,

over potential violations of defendants’ rights”; this cannot be acceptable in a strong and independent ICC.

⁷ According to Zehr, restorative justice “involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” Howard Zehr, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (Herald Press, 1990).

⁸ Rule 2A, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, “Rules of Procedure and Evidence,” adopted on 11 Feb. 1994, pursuant to Article 15 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted on 25 May 1993 by Security Council Resolution 827; Rule 2A, International Criminal Tribunal for Rwanda, “Rules of Procedure and Evidence,” adopted on 29 June 1995, pursuant to Article 14 of the Statute of the International Criminal Tribunal for Rwanda, adopted on 8 Nov. 1994 by Security Council Resolution 955.

⁹ Proposal by Colombia: *Comments on the report on the international seminar on victims’ access to the International Criminal Court*, PNCICC/1999/WGRPE/DP.37, 10 Aug. 1999.

THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION

Gunel Guliyeva*

International criminal law has developed over several decades from the establishment of the Nuremberg and Tokyo Tribunals to try those who perpetrated atrocities in the course of World War II to the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The creation of the International Criminal Court (ICC) appears as the latest contour in the evolution of international criminal justice.

The development of international criminal law has been marked by the foundation and refinement of general principles, including theories of criminal responsibility. It is now well established that a person bears responsibility for war crimes, crimes against humanity, genocide and other international crimes on the basis of the principle of individual criminal responsibility.¹ Individual criminal responsibility embraces both commission of a crime in person and participation in a group criminality. One mode of participation, so-called Joint Criminal Enterprise (JCE), which has been mostly elaborated by the ICTY, is the focus of this paper. The concept of JCE has been a topic of broad discussions and scholarly opinion remains split: some consider the concept as a positive development that allows for prosecution of the architects of heinous crimes who otherwise might escape proper responsibility; others argue that JCE contradicts principles of criminal law, particularly the principle of culpability.² The ICTY itself has recently made several efforts to review the concept of JCE and has even attempted to apply a different concept of criminal liability.³ In light of this ongoing debate, an important question is whether the concept of JCE will be adopted and used by the ICC.

The main objective of this paper is to identify any potential premises for the adoption of the JCE concept by the ICC and to consider to what extent this concept should be resorted to under the Court's jurisdiction. The first section discusses the origins and forms of the concept of JCE, as well as its objective and subjective elements, and presents major criticisms of the concept. This section also briefly introduces other modes of criminal liability, concentrating on the difference between JCE and aiding and abetting. The second

* GUNEL GULIYEVA received a LLM in Law from the University of Essex in 2007.

¹ It is worth noting that command (superior) responsibility is deemed either as an additional ground of individual criminal responsibility or is considered separately. See Gerhard Werle, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 94 (T.M.C. Asser Press, 2005); Robert Cryer, *General Principles of Liability in International Criminal Law*, in Dominic McGoldrick, Peter Rowe, & Eric Donnelly (eds.), *THE PERMANENT INTERNATIONAL CRIMINAL: LEGAL AND POLICY ISSUES* 235 (Hart Publishing, 2004); Daryl A. Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY State*, in Gideon Boas & William A. Schabas (eds.), *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 239 (Martinus Nijhoff Publishers, 2003).

² See Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 91 (2007).

³ See *Brdjanin* (Trial Chamber), 1 September 2004, at ¶355; *Stakic* (Trial Chamber), 31 July 2003, at ¶¶438, 528.

section examines the treatment of individual criminal responsibility by the Rome Statute of the ICC. This section introduces Article 25 of the Statute, which provides for vast modes of individual criminal responsibility, and analyzes co-perpetration as it is interpreted by the Court. Notion, origins, and use of the *control over crime* approach are examined. In comparing objective and subjective elements of the concept of co-perpetration, based on both the control over crime approach and that of the concept of JCE, this section further argues that the control over crime approach is capable of overcoming most of the deficiencies of JCE.

The paper concludes that the *basic* form of JCE (JCE I) could be partially included under the concept of co-perpetration within the meaning of the Rome Statute. It is suggested that JCE I, when it fails to reach the joint control over crime criteria, can be subsumed under aiding/abetting or complicity in group crimes. Whether *systemic* and/or *extended* forms of JCE (JCE II and III, respectively) might fall under modes of criminal liability provided for by the Rome Statute is questionable; JCE II and III may be best covered by accessory modes of liability. Moreover, application of JCE III under ICC jurisdiction is unwarranted.

I. THE CONCEPT OF JOINT CRIMINAL ENTERPRISE

Notion and Origins of the JCE Concept

International crimes are gross violations usually committed by groups in a systematic manner. Without a certain degree of cooperation and coordination of actions, it is virtually impossible to perpetrate atrocities such as genocide or crimes against humanity.⁴ However, it is well-established that criminal responsibility is attributed to individuals, most precisely to natural persons;⁵ one of the concerns of international criminal law is identification of the individual responsibility of every person cooperating in the commission of a crime.

As Ohlin observes, group criminality is one of the most difficult issues in criminal law theory, because once “criminal conduct is pursued at the collective level by gangs, militias and criminal organizations, their intention to commit the crime and their culpability resides at the collective level. In some sense, it might be correct to say that the whole group is guilty of wrongdoing.”⁶ Nevertheless, every participant of such a collective endeavor must be brought to trial individually, in accordance with one of the general principles of international criminal law: the principle of individual criminal responsibility.⁷

⁴ Van der Wilt, *supra* note 2, at 91.

⁵ Michael Duttwiler, *Liability for Omission in International Criminal Law*, 6 INT’L CRIM. L. REV. 1, 1 (2006).

⁶ Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69, 70 (2007).

⁷ Werle, *supra* note 1, at 116, marginal note 338; Ohlin, *supra* note, at 69-70; Attila Bogdan, *Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, 6 INT’L CRIM. L. REV. 63, 64 (2006).

International criminal tribunals have faced the challenges of how to give the collective character of crimes proper consideration and how to identify the liability of persons who may not have physically committed heinous acts themselves but instead stood behind while others did the “dirty work.”⁸ Different modes of criminal participation have developed in response to this challenge.⁹ According to the Statutes of the ICTY and ICTR, “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in ... the present Statute, shall be individually responsible for the crime.”¹⁰

Joint Criminal Enterprise (JCE), a form of criminal participation, is a concept that was established in the case law of the ICTY in order to deal with situations where the weight of other participants’ contributions is no less than that of physical perpetrators and where the previously mentioned modes of participation do not fairly reflect “the moral gravity” of such contributions.¹¹ As explained by the ICTY Trial Chamber in the *Tadic* case,

to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.¹²

JCE is characterized by the existence of a “common criminal plan or purpose” pursued by a plurality of persons; all individuals who contribute to the carrying out of crimes in execution of a common purpose may be subjected to criminal liability.¹³ Participation in a joint criminal enterprise is “a form of commission,” as opposed to accomplice liability.¹⁴ As van der Wilt observes, “JCE doctrine has emerged as a ‘jack of all trades’, coping with mob violence, providing for extensive criminal responsibility for political and military leaders and addressing the responsibility of those who are involved in a criminal organization like a detention camp.”¹⁵

⁸ Van der Wilt, *supra* note 2, at 91.

⁹ For more detailed discussion, see Albin Eser, *Individual Criminal Responsibility*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOL. I 784 (Oxford University Press, 2002); Werle, *supra* note 1, at 117, marginal notes 339-342.

¹⁰ Statute of the International Tribunal for the Former Yugoslavia, at Art. 7(1) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, at Art. 6(1) [hereinafter ICTR Statute].

¹¹ *Tadic* (Appeals Chamber), 15 July 1999, at ¶191.

¹² *Id.*, at ¶192; see also *Blagojevic and Jokic* (Trial Chamber), 17 January 2005, at ¶695.

¹³ *Id.*, at ¶190; see also *Brdjanin*, *supra* note 3, at ¶258.

¹⁴ *Kvočka et al.* (Appeals Chamber), 28 February 2005, at ¶79; *Blagojevic and Jokic*, *supra* note 12, at ¶696.

¹⁵ Van der Wilt, *supra* note 2, at 92.

COMMITMENT TO THE INTERNATIONAL CRIMINAL COURT AMONG SUB-SAHARAN AFRICAN STATES

Claire Lauterbach*

African states have played a vital role in the development of the world's first permanent international criminal tribunal. The continent has experienced some of the most egregious episodes of violence, and, as of December 2008, all cases being considered by the International Criminal Court (ICC) involve African conflicts. The governments of the Central African Republic, Uganda, and the Democratic Republic of the Congo have each initiated one of the four investigations currently in the Court hearings. The Prosecutor's unprecedented decision to seek an arrest warrant for the sitting President of Sudan pursuant to the Security Council mandated investigation of crimes against humanity and genocide in Darfur has sparked a whirlwind of speculation among both proponents and detractors of the Court regarding how the ICC might shape and be shaped by the domestic politics of Africa. African states are likely to be what Finnemore and Sikkink term "critical states" to the evolution of the ICC.¹

Yet the Court's relationship with modern Africa contains a fundamental tension. While accused of "targeting" only African politicians for special condemnation, the ICC has also been positively welcomed among African human rights groups as legitimizing their domestic attempts to seek redress for crimes. Max Du Plessis, a South African international lawyer, argues that intolerance of crimes against humanity is being "internalized as part of the fabric of the African continent."² In what he terms a "public demonstration of justice," all but six sub-Saharan African states have signed the Rome Statute of 1998.³ Yet only thirty states, slightly over two-thirds of the total number of states in sub-Saharan Africa, have ratified the treaty, thereby formally consenting to be bound by the treaty's obligations. Why do African states accede

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¹ Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887(1998).

² Max Du Plessis, *Africa and the International Criminal Court*, available at <http://www.csvr.org.za/wits/confpaps/duplessis.htm>.

³ This study examines the following sub-Saharan African states: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo-Brazzaville, Côte d'Ivoire, the Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. Somalia is excluded specifically for two reasons. Somalia's internationally recognized state collapse is a unique situation that prohibits fruitful comparison. Furthermore, Somalia was one of two sub-Saharan states not represented at the 1998 Diplomatic Conference at which the ICC treaty was signed in 1998. (The other, Equatorial Guinea, is still included because though it has not signed the ICC treaty, it has committed to a Bilateral Immunity Agreement with the U.S., demonstrating that the state leadership is engaging the ICC regime.)

to the Rome Statute, thereby accepting the jurisdiction of the International Criminal Court to hear cases concerning events occurring on or after July 1, 2002.⁴ States appear to derive no direct benefit from this action. Ratifying the Rome Statute signals a permanent commitment that empowers the Court to investigate and prosecute human rights abuses occurring within a domestic context, specifically four categories of crimes—genocide, war crimes, crimes against humanity, and the crime of aggression. Jurisdiction extends to crimes involving the state party's citizens (as either aggressors or victims) and crimes occurring on the state's territory.⁵ Why then have many African states—often with acute histories of violence—enthusiastically accepted the Court and opened their domestic political systems to the possibility of international scrutiny? And why do others vociferously refuse its jurisdiction, even at the risk of being international pariahs?

Given the significant variation in the pattern of ratification of the Rome Statute by states within the sub-Saharan African region, a more nuanced analysis of accession to the ICC needs to consider the domestic political dynamics of the acceding states. Furthermore, several alternate models for dealing with grave human rights abuses—UN-mandated tribunals, truth and reconciliation commissions, and domestic trials for war crimes, for example—have already been enacted in response to African conflicts. The decision to accept the jurisdiction of the International Criminal Court is an empirical puzzle, with theoretical and practical implications for our understanding of the preferences states bring in to their interactions with international institutions. This study uses logistic regression analysis of party and non-party states to examine factors affecting the decisions of sub-Saharan African states to ratify or refrain from ratifying the Rome Statute. This decision, I argue, defines the stance of states towards an institution that is revolutionizing African politics. Following preliminary statistical findings, I trace the political trajectories of six African states as case studies of accession and non-accession. Among sub-Saharan African states, accession to the International Criminal Court appears linked to domestic agendas of political reform.

⁴ Because states may merely sign the treaty without intending to ratify it in order to relieve international pressure to actually amend human rights practices, I distinguish between acceding to the ICC and merely signing the Rome Statute, which is a type of “thin commitment” to the human rights regime. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1870, 1935 (2002).

⁵ Rome Statute of the International Criminal Court, 1 July 2002 [hereinafter Rome Statute], at Art. 5.

Table 1: Sub-Saharan African States by Commitment to the Rome Statute*

<i>Signed and Ratified</i> (date of ratification)	<i>Signed Only</i> (date of signature)	<i>Not Signed</i>
Benin (22 Jan. 2002)	Angola (7 Oct. 1998)	Equatorial Guinea
Botswana (8 Sept. 2000)	Cameroon (17 July 1998)	Ethiopia
Burkina Faso (16 Apr. 2004)	Côte d'Ivoire (30 Nov. 1998)	Mauritania
Burundi (21 Sept. 2004)	Eritrea (7 Oct. 1998)	Rwanda
Central African Rep. (3 Oct. 2001)	Guinea Bissau (12 Sept. 2000)	Swaziland
Chad (1 Nov. 2006)	Mozambique (28 Dec. 2000)	Togo
Comoros (18 Aug. 2006)	Sudan (8 Sept. 2000)	
Congo-Brazzaville (3 May 2004)	Zimbabwe (17 July 1998)	
Dem. Rep. Congo (11 Apr. 2002)		
Djibouti (5 Nov. 2002)		
Gabon (20 Sept. 2000)		
Gambia (28 June 2002)		
Ghana (20 Dec. 1999)		
Guinea (14 July 2003)		
Kenya (15 Mar. 2005)		
Lesotho (6 Sept. 2000)		
Liberia (22 Sept. 2004)		
Madagascar (14 Mar. 2008)		
Malawi (19 Sept. 2002)		
Mali (16 Aug. 2000)		
Mauritius (5 Mar. 2002)		
Namibia (25 June 2002)		
Niger (11 Apr. 2002)		
Nigeria (27 Sept. 2001)		
Senegal (2 Feb. 1999)		
Sierra Leone (15 Sept. 2000)		
South Africa (27 Nov. 2000)		
Tanzania (20 Aug. 2002)		
Uganda (14 June 2002)		
Zambia (13 Nov. 2002)		

* As of April 2008.

I. AFRICA ON TRIAL?

Despite the optimism over the supposed enthusiasm for the ICC among many of the region's governments, Africa remains the world's bloodiest continent—in many ways, “impunity's last stand.”⁶ Most African conflicts arise from domestic and not international crises. According to international relations scholar Robert Jackson, in 2002, half of Africa's states were engaged in some form of armed conflict, affecting twenty percent of the continent's population, with most conflicts arising in the post-1980 period.⁷ Africanist political scientists frequently characterize this violence as prevalent because most

⁶ Paul Ocheje, *Refocusing International Law on the Quest for Accountability in Africa: The Case Against the “Other” Impunity*, 15 LEIDEN J. INT'L L. 749, 762 (2002).

⁷ Robert Jackson, *Violent Internal Conflict and the African State: Towards a Framework of Analysis*, 20 J. CONTEMP. AFRICAN STUDIES 29, 30 (2002).

A WEAK ICC: CAN THE INTERNATIONAL CRIMINAL COURT SUCCEED WITHOUT U.S. PARTICIPATION?

Irene Marinakis*

Over the past decade the world has witnessed an increasing interest of the international community in combating impunity for war crimes, genocide, and crimes against humanity, which has resulted in the establishment of a number of judicial bodies. The creation of the International Military Tribunal (“Nuremberg Tribunal”) and the International Military Tribunal for the Far East (“Tokyo Tribunal”) would ultimately lay the foundation for future *ad hoc* tribunals. The establishment by the United Nations Security Council (“SC”) of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (“ICTY”) in 1993 and Rwanda (“ICTR”) in 1994 under Chapter VII of the United Nations (“UN”) Charter set the basis for future criminal courts and tribunals under international auspices in the following years.¹ During the summer of 1998, the UN sponsored a major diplomatic conference in Rome to negotiate a statute for a new international criminal court (“ICC” or “the Court”). After five weeks of exhaustive negotiations, the conference adopted the statute by a large majority. The birth of the Rome Statute brought new hopes and raised new challenges for international criminal justice. However, even before this document entered into force, it became increasingly clear that a showdown was looming between the Court and the U.S., which has not yet ratified the treaty and appears to have no intention of doing so in the immediate future.²

U.S. opposition to the ICC is extremely important to examine in depth, given that the U.S. is regarded as the sole superpower and has a determinative role in the conduct of global politics. This paper seeks to examine the evolving position that the U.S. has developed towards the ICC in the last few years. Having strenuously opposed the Court in the past,³ the U.S. is currently ap-

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¹ Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community*, 2 J. INT’L CRIM. JUST. 304, 304 (2004).

² “Both Obama and McCain generally favor the concept of a standing tribunal to deal with war crimes, but they share President Bush’s anxiety about the potential of politically motivated prosecutions of U.S. officials or soldiers...In a speech recognizing the 10th anniversary of the Rome Statute last April, John B. Bellinger, the State Department’s top lawyer, said the U.S. will cooperate actively with the court but will not ratify the Rome Statute for a long time. He said the U.S. relationship with the court will depend on ‘the extent to which the United States and ICC supporters agree to disagree.’ William C. Mann, *U.S. Policy on International Court Unlikely To Shift*, ASSOCIATED PRESS, 14 Oct. 2008.

³ The cautionary tone towards the Court began with President Clinton who did not sign the Rome Statute until 31 Dec. 2000, the last day it was open for signature. Clinton recommended that his successors follow his lead and refrain from seeking Senate ratification of his signature “until our fundamental concerns are satisfied.” Not only did Bush not submit the document to the Senate for ratification, he suspended Clinton’s signature saying that, “The United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its

proaching it with more flexibility, especially in the case of Sudan. This paper discusses whether the ICC can move forward without the help of the U.S., particularly in relation to the ability to compel Sudan, for example, to arrest suspects indicted for war crimes. By looking at the cases currently pending before the ICC, specifically those regarding Uganda and the Sudan, the article examines the current progress of the Court. In discussing why the U.S. opposes ratifying the Rome Statute, the article makes some predictions as to the ICC's potential for success.

I. FORMATION OF THE ICC AND OVERVIEW OF THE ROME STATUTE

The idea of creating a permanent international criminal court began long before the Rome Statute in the late 1990s. After WWI, there was momentum for an international tribunal to try German crimes. The Versailles Treaty provided that Germany hand over "persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers."⁴ Then, in 1937, the League of Nations organized and concluded a Convention for the Creation of an International Criminal Court, which was signed by representatives of ten European states.⁵ This court never materialized. After World War II, the Nuremberg and Tokyo Tribunals raised real expectations for the culture of accountability. At the request of the UN General Assembly ("GA"),⁶ the International Law Commission prepared a draft statute for an international criminal court in 1952, entitled "Report of the Committee on International Court Jurisdiction."⁷ Two years later, this draft was resubmitted in light of the comments contributed by Member States.⁸ These two statutes were quickly shelved, however, as the Cold War made the establishment of an international criminal court and progress on the war crimes agenda politically unrealistic.⁹

The UN did not resume its consideration of the proposed international criminal court until the late 1980s. In December 1989, the GA, responding to a request from a member state (Trinidad and Tobago, but in connection with illicit trafficking in narcotics across national frontiers), asked the International Law Commission, an organ of the GA, to resume its long abandoned work on an international criminal court.¹⁰ Their proposal did not get very far. It was not until the outbreaks of the conflicts in the former Yugoslavia and Rwanda

signature on Dec. 31, 2000." *U.S. To Back Out of International Court Treaty*, WASH. POST, 5 May 2002.

⁴ Treaty of Versailles, 28 June 1919, at Art. 229.

⁵ The Final Act of the Conference was published in League of Nations Document C.547.M.384.1937.V., 16 November 1937. The signatories were Belgium, Bulgaria, Czechoslovakia, France, Greece, Netherlands, Rumania, Spain, Turkey, and Yugoslavia.

⁶ G.A. Res. 489 (V), 12 Dec. 1950.

⁷ Report of the Committee on International Criminal Court Jurisdiction, U.N. Doc. A/2135 (1952), Supplement No. 11 (A/2136).

⁸ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954), Supplement No. 12 (A/2645).

⁹ William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 9 (Cambridge University Press, 2007).

¹⁰ G.A. Res. A/RES/44/39, 4 Dec. 1989.

that the idea of international criminal justice in the contemporary era ever really took hold.¹¹

While the International Law Commission continued its work on a draft statute for an international criminal court, the SC voted to create two *ad hoc* tribunals for the former Yugoslavia¹² and Rwanda,¹³ in response “to what it described as the deliberate, systematic, and outrageous violations of human rights and humanitarian norms committed” in these two territories.¹⁴ The work of both tribunals demonstrated that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law were both possible and credible.¹⁵ “No less, the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court.”¹⁶ The development of an international criminal court continued partly as a result of “tribunal fatigue,”¹⁷ but also, “because a number of states wanted to remove the Security Council’s monopoly on international tribunals, which the states saw as being too selective in distributing justice.”¹⁸

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome.¹⁹ More than 160 states sent delegates to the Conference, in addition to a range of international organizations and hundreds of nongovernmental organizations. “These developments could not have taken place without a powerful new coalition driving further criminalization of international humanitarian law. ... [T]his new coalition includes scholars that promote and develop legal concepts and give them theoretical credibility, [and] NGOs that provide public and political support and means of pressure...”²⁰ The contribution of global society, and particularly this coalition, which resulted in the adoption of the Rome Statute, has been unprecedented in international treaty negotiations.²¹

¹¹ Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT’L L. J. 445, 446 (2003).

¹² UN Doc. S/RES/808, 22 Feb. 1993.

¹³ UN Doc. S/RES/955, 8 Nov. 1994.

¹⁴ Sterling Johnson, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OF INTERNATIONAL CRIMINAL LAW 183 (Ashgate Publishing Company, 2003).

¹⁵ Theodor Meron, *War Crimes Law Comes of Age*, 92 AJIL 462, 463 (1998).

¹⁶ *Ibid.*

¹⁷ In the UN’s overview of why we need an International Criminal Court, one of the responses was to remedy the deficiencies of *ad hoc* tribunals: “The delays inherent in setting up an *ad hoc* tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of *ad hoc* tribunals may soften the political will required to mandate them.” United Nations, *Establishment of an International Criminal Court: Overview*, available at <http://untreaty.un.org/cod/icc/general/overview.htm>.

¹⁸ Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 L. & CONTEMP. PROBS. 3, 4 (2001).

¹⁹ UN Press Release L/2867, *UN Diplomatic Conference to Establish International Criminal Court to Convene in Rome, 15 June–17 July*, 8 June 1998.

²⁰ Meron, *supra* note 15, at 468.

²¹ Cenap Çakmak, *The International Criminal Court in World Politics*, 23 INT’L J. ON WORLD PEACE 11 (2006).

NOTE

Prosecuting the Pandemic: Strengthening International Public Health Law

*Justin Kamen**

Pandemic diseases pose a significant threat to the international community, threatening more death and destruction at this point in time than war or genocide. In a world defined by international connectivity, a deadly new virus can appear in a small village and within weeks spark a global health emergency.¹ Every country has a responsibility to be open and forthright with all information regarding potentially pandemic diseases. However, there has been little success in attempting to force cooperation from nations in which these threatening diseases surface. For example, when severe acute respiratory syndrome (SARS) emerged in China in 2002, individuals within the Chinese government tried to cover up the deadly respiratory disease for economic and political purposes.² Severity of the outbreak only came to light when leaked by a military doctor at great personal risk. Although thousands were infected and hundreds died, the virus was eventually contained and an even more devastating pandemic averted.³ If the virus had continued to spread unnoticed, the crisis could have easily erupted into a terrible international disaster as the epidemic spread into unprepared nations around the world. China's indiscretions could have led to the deaths of millions worldwide. This set a dangerous precedent in a world of increasing global health concerns and decreasing barriers between nations.

Today, the international community faces another public health threat. Emerging from bird populations in the last decade, the H₅N₁ Avian influenza virus has mutated to infect other animals, including humans, at a devastating rate of mortality. The virus is not only unprecedented in its ability to cross multiple species barriers; it also maintains a nearly 60% case fatality rate. Additionally, human-to-human infections have been reported.⁴ Experts warn that this virus has the potential to cause a severe flu pandemic similar to, and potentially worse than, the Spanish Flu of 1918, which killed approximately 50 million people worldwide over two years.⁵ In today's overpopulated and complex global community, a severe flu pandemic would bring terrible consequences not only for public health, but also for economies and governments

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¹ Ken McGee, *Interview with Dr. David Nabarro*, GARTNER, 22 Dec. 2005, available at http://www.gartner.com/research/fellows/fellow_interview_nabarro.jsp,

² *China accused of SARS "cover-up,"* BBC NEWS, 9 Apr. 2003, available at <http://news.bbc.co.uk/2/hi/health/2932319.stm>.

³ World Health Organization, *Global Outbreak Alert & Response Network*, available at <http://www.who.int/csr/outbreaknetwork/en/>.

⁴ Department of Health and Human Services: Centers for Disease Control and Prevention, *Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H₅N₁) Virus*, 7 May 2007, available at <http://www.cdc.gov/flu/avian/gen-info/facts.htm>.

⁵ John Barry, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HUMAN HISTORY* 450 (Viking, 2004).

all over the world. Worker absenteeism could disrupt the global economy and abruptly halt the production and distribution of important goods, including food and oil. Unfortunately, experts in epidemiology and virology widely agree that another pandemic is inevitable and that the deadly H₅N₁ virus poses a very serious risk.

Efforts should be taken to contain and mitigate the next pandemic. Since 1918, the world has developed scientific techniques to track viruses and, more importantly, has established an international community to face global challenges. The key to heading off a pandemic is early detection and rapid response.⁶ Regrettably, like China during the SARS outbreak, many of the countries experiencing H₅N₁ poultry outbreaks and human cases have been withholding timely information. Indonesia, the country most affected by the virus, has for over two years used viral sequences as political bargaining chips. Rather than helping combat this threat, the country has taken a stance that it would profit off of the virus samples as intellectual property. If this virus causes the next pandemic, individuals in the nations responsible for the atrocious cover-ups and sample hoarding should be found culpable.

Recent legal battles concerning emerging pandemic diseases have involved Indonesia's refusal to share H₅N₁ virus samples with the international community. As Indonesia is the country worst affected by the virus, many worry that the virus could undergo pandemic mutations undetected by Western scientists for lack of recent samples from the region.

Though these issues have arisen in international law debates, their solutions usually employ the World Health Organization (WHO), which lacks adequate methods of enforcement. Such methods include reliance on the International Health Regulations (IHR) and legislation from the World Health Assembly (WHA). Newer proposals that take leverage instruments of international trade show more promise for achieving meaningful results. While acknowledging these prospects, this paper argues that incentivizing cooperation in preparation for global pandemics does not go far enough. Rather, the paper proposes an additional coercive mechanism that takes advantage of an existing international legal instrument that has so far not surfaced in discussions of global health: the International Criminal Court. To wit, using the legal framework established by the Rome Statute in regards to crimes against humanity, individuals who would withhold vital public health information for political or economic advantage should be held accountable for their actions in an international court. By standing in the way of global preparation efforts, leaders and officials in these countries doom the international community to helplessness in the face of an emerging public health threat. Therefore, withholding accurate and timely information on dangerous infectious diseases, particularly H₅N₁, should be constituted as a crime against humanity in the jurisdiction of the International Criminal Court under Article 5 of the Rome Statute.

The international community must act strongly against such barriers to public health response measures. Withholding vital public health information for political purposes should be unequivocally deemed a serious criminal offence. Like other atrocious crimes against humanity, these actions must be

⁶ Technology, Entertainment, Design (TED), *Speakers: Larry Brilliant*, July 2006, available at <http://www.ted.com/index.php/talks/>.

condemned by the international community within a strong legal framework. Most importantly, perhaps, this shift in attitude towards pertinent public health issues would ensure a new set of rigidly defined norms in reaction to the unprecedented threat to state security posed by emerging diseases like SARS and H₅N₁. Through changes to international law, we can construct a comprehensive global system to ensure and enforce early detection of, and response to, dangerous infectious diseases, wherever they may emerge.

I. THE GLOBALIZATION OF PUBLIC HEALTH THREATS

The current framework designed to promote international cooperation in combating global public health threats is inadequate to address the challenges presented by the modern globalized era. Technological advancements, most importantly widespread air travel, have reduced the limitations previously associated with vast geographical distance. This increased freedom of movement has made it increasingly difficult for states to protect their populations from diseases passing through their fluid borders. Additionally, there are weak domestic public health infrastructures due to governmental reductions in expenditures. Globalization has also contributed to unprecedented population growth, which creates overcrowding and vast reservoirs of impoverished people who lack even the most basic access to medical facilities. These conditions increase the need to address the growing threat of international health emergencies.

Responsibility for managing the growing concerns of international health crises largely falls on the WHO. Though the Organization has been effective in globalizing disease control programs, such as the eradication of smallpox in the 1970s, the WHO rarely uses its political power to pressure noncompliant nations. Under Article 21 of the Constitution of the World Health Organization, "The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease."⁷ The World Health Assembly, the forum through which Member States govern the WHO, is the world's highest health policy setting body and has the charge of deciding major legal questions. It has the authority to adopt regulatory measures to address pertinent global health issues. Unfortunately, the WHO provides a weak precedent of enforcement upon which to construct important international law.

The International Health Regulations (IHR), which are administered by the WHO, are currently the most important set of international legal rules for controlling infectious diseases. The Regulations were introduced in 1969 to "ensure the maximum security against the international spread of diseases."⁸ Since then, they have been revised and remain the most binding international legislation on disease reporting. At their inception, the Regulations obliged WHO Member States to notify the international community of every case of smallpox, plague, or yellow fever. After its eradication in the 1970s, smallpox

⁷ Constitution of The World Health Organization, 22 July 1946.

⁸ World Health Organization, *The International Health Regulations (1969), Third Annotated Edition 1983* (available at <http://www.who.int/csr/ihr/ihr1969.pdf>), at 5.

BOOK REVIEWS

Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books, 2006)

*Jessica Beess und Chrostin**

The July 14, 2008 indictment of the Sudanese President, Omar al-Bashir, by the International Criminal Court (ICC) was preceded by intense debate about whether the move would harm the international effort to broker peace in Darfur and in the country as a whole. Proponents argued that there could be no peace without justice and that the ICC had an unequivocal duty to prosecute heinous war crimes at all times and at all levels. Opponents, on the other hand, feared the impact on ongoing peace efforts and asked what incentives remain for rogue leaders to make peace when their only reward will be prosecution. In this context, Tim Allen's *Trial Justice: The International Criminal Court and the Lord's Resistance Army* provides valuable insight into how ICC activities can impact, or possibly be manipulated by, political leaders. Allen, a reader in development studies at the London School of Economics, analyzes the situation in Uganda in 2005 and focuses in particular on ICC intervention and local opinions thereof. His work provides a provocative and insightful analysis of the relationship between peace, justice, and reconciliation that is essential to our current understanding of the Court's evolving role.

In the preface, Allen provides the reader with valuable insight into his personal relation to the borderlands of Uganda and his research methods. Allen spent four years in southern Sudan and two years in northern Uganda in the 1980s, initially as a teacher in rural secondary schools and at Juba University, and later as a field researcher among the Acholi and Madi. Although Allen states that previous field research provides a basis for much of his recent work, most of the research for this publication was conducted 20 years later, in November 2004 and March 2005, in numerous locations, including Gulu, Kitgum, Lira, Adjumani and Pader municipalities, and displacement camps at Awee, Opit, Awere, Lalogi, Anaka, Labuje, Pader, Pagimo, Corner Ogur, Abia, Agweng, Atiak, and Pabbo. Allen and his research assistants conducted around four hundred interviews with individuals and groups, including district officials, aid agency staff, peace negotiators, LRA combatants, and over two hundred people living in the displacement camps. Though these interviews were obviously numerous, Allen abstains from providing any gender and/or geographic breakdown of interviewees and cites names only in the context of direct quotations. Interviews were conducted in English, Lwo (an Acholi and Langi language which Allen can write and speak on a basic level), and Maditi (the Madi language). Clearly, his research methods appear to be thorough and provide the reader with insight into the regional opinions and context of the situation.

Allen begins his account with a brief history of the subject matter. The first chapter is dedicated to the establishment of the ICC and the second summarizes the development of the situation in Uganda through mid-2005. Allen's summary is particularly engaging and he succeeds in establishing himself as an objective narrator by taking into account numerous points of view expressed by individuals on both sides of the conflict—a rather difficult task

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rity—if it continues to keep an open mind and to learn from the mistakes of the past.

Reading *Trial Justice: The International Criminal Court and the Lord's Resistance Army* is an informative and enriching experience. Coupled with careful presentation of local voices, Allen's extensive empirical engagement with the region and comprehensive knowledge of the subject matter result in an insightful and provocative piece of work. In a time when the relation between peace, justice, and reconciliation is hotly debated by scholars and government leaders alike, Allen's work provides an essential contribution to the study and practice of international justice.

Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008)

*Elena Pokalova**

Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, has identified the increasing demand for supranational actors at the level of global governance. "Peoples and their governments around the world need global institutions," she argues in her 2004 treatise, "to solve collective problems that can only be addressed on a global scale."¹ Despite the clear need to overcome collective action problems at the global level, strong states still challenge the development of global institutions that threaten to dilute state sovereignty. The modern creation of the ICC is significant in establishing a supranational institution whose powers do in fact transcend those of a sovereign state. In light of the challenges to erecting a supranational institution with such broad scope, however, there exists a debate on the nature of the political processes that led to the very construction of this international body. Why did the ICC succeed while so many other supranational institutions ended up in the scrap heap? Why did the ICC appear in 2002 instead of 1946, when it was originally proposed? In an attempt to shed light on this issue, Michael J. Struett, assistant professor at the Department of Political Science at North Carolina State University, investigates the political story behind the Rome Statute. Struett examines the intricacies behind the creation of the ICC and in so doing reevaluates the role of agency in the contemporary global arena.

Struett begins by tracing the ICC negotiations back to 1946. There were calls for an international justice mechanism in the aftermath of World War II, but it was not until 2002 that the ICC was finally established. Struett attributes the auspicious climate for the reception of such a mechanism in 2002 to the growing prominence of nongovernmental organizations (NGOs), many of which advocated for an international court. Interestingly, the inception of Struett's project itself dates back to 2000, when the future of the ICC negotiations was still not clear. Despite the uncertainty at the time, Struett felt the need to look deeper into the dynamics behind the creation of a unique international agency irrespective of the final outcome. As we now know, the Rome

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¹ Anne-Marie Slaughter, *A NEW WORLD ORDER* 8 (Princeton University Press, 2004).